In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1573

ARCHIE PELTZMAN, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

1. In September 1971, petitioner filed with the National Labor Relations Board an unfair labor practice charge against the American Radio Association (the Union), alleging that it had declined, because he lacked union membership, to clear him through the hiring hall so that he could resume work for Central Gulf Steamship Corporation (the Company), and that it had discriminatorily refused to enroll him in the industry radio school. The same day, petitioner also filed a charge against the Company, alleging that it had improperly discharged him for lack of union membership (Pet. App. 16a).

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Following an investigation, the Board's Regional Director notified petitioner that he would not issue a complaint on the charges. The refusal to clear petitioner was permissible, he stated, since petitioner had failed to pay the initiation fee which the Union was entitled to collect pursuant to a valid union security agreement with the Company; the denial of enrollment in the radio school was not due to petitioner's nonmembership in the Union, as claimed, but was based solely on the fact that petitioner lacked the qualifications for admission (see Appendix A, *infra*, pp. 5–6); and the Company's refusal to rehire petitioner was not unlawful, again because of his refusal to pay the initiation fee required by the valid union security agreement (see Appendix B, *infra*, pp. 8–9). Petitioner appealed the decision to the General Counsel of the Board, who sustained the Director (Pet. App. 22a–23a).[1]

Petitioner then filed a petition in the United States Court of Appeals for the Second Circuit, to review the General Counsel's refusal to issue an unfair labor practice complaint. The Board moved to dismiss the petition on the ground that the General Counsel's action is not a final order within the meaning of Section 10(f) of the Act, 29 U.S.C. 160(f).[2] The court of

[1] The General Counsel noted that he had a year earlier determined that petitioner had been lawfully expelled from the Union for nonpayment of dues, and thus that the Union did not violate the Act by requiring him to apply for membership as a new member (Pet. App. 22a–23a, 20a–21a).

[2] Section 10(f) provides that: "Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain review of such order" in the appropriate court of appeals.

appeals granted the motion, and dismissed the petition (Pet. App. 1a–2a).[3]

2. The decision of the court of appeals is correct. Under Section 10(f) of the Act, a court of appeals has jurisdiction to review only a "final order of the Board." It is well settled that the action of the General Counsel in refusing to issue a complaint—as was the case here—is not a "final order of the Board," within the meaning of Section 10(f). See, *e.g.*, *Lincourt* v. *National Labor Relations Board*, 170 F.2d 306 (C.A. 1); *Manhattan Construction Co.* v. *National Labor Relations Board*, 198 F.2d 320, 321–322 (C.A. 10); *Anthony* v. *National Labor Relations Board*, 204 F.2d 832, 833 (C.A. 6); *Contractors Ass'n of Philadelphia and Eastern Pennsylvania* v. *National Labor Relations Board*, 295 F.2d 526 (C.A. 3), certiorari denied, 369 U.S. 813.[4] See also *Hamlet* v. *National*

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[3] The court also denied petitioner's motion for leave to adduce additional evidence and his cross-motion to produce the record for review (Pet. App. 3a–4a, 5a–6a).

[4] Petitioner's claim (Pet. 11) that the court of appeals decided the case without the benefit of the "record" is not well taken. In determining the threshhold question of jurisdiction under Section 10(f), the only "record" needed for proper resolution of the issue is the administrative rulings of the Regional Director and the General Counsel. These were before the court. Until the General Counsel exercises his discretionary authority to issue a complaint, the formal hearing requirements of Section 10(b) of the Act, 29 U.S.C. 160(b), are not applicable.

Petitioner's reliance on 46 U.S.C. 599, as precluding the Company from refusing to rehire him for nonpayment of the initiation fee, is misplaced. The criminal statute to which petitioner refers (Pet. 18–19) is not applicable to union security clauses, which are expressly sanctioned by the proviso to Section 8(a)(3) of the Act, 29 U.S.C. 158(a)(3).

Labor Relations Board, No. 71–1131, certiorari denied, May 15, 1972.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

PETER G. NASH,
General Counsel,
National Labor Relations Board.

JUNE 1972.

APPENDIX A

NATIONAL LABOR RELATIONS BOARD,
REGION 2, FEDERAL BUILDING,
New York, N.Y., October 26, 1971.

Re American Radio Association (Central Gulf Steamship Corporation).
Case No. 2–CB–5033.

Mr. ARCHIE PELTZMAN,
8725 16th Avenue,
Brooklyn, N.Y.

DEAR SIR: Your charge in the above-entitled case alleging a violation under section 8 of the National Labor Relations Act, as amended, has been carefully investigated and considered.

As a result of the investigation, it does not appear that further proceedings on the charge are warranted.

The evidence does not tend to establish that the above-named Union violated the National Labor Relations Act. The evidence establishes that pursuant to a valid Union security agreement you were obligated to pay an initiation fee to the Union which you refused to do after notification by the Union that such fees were due. Under such circumstances the refusal by the Union to refer you to your former permanent position aboard the S.S. Green Ridge was permissible.

Insofar as the charge alleges that you were not enrolled in the industry school because of your lack of membership in the Union, the evidence does not support such claims, inasmuch as you did not qualify for admission to the course for which you sought enrollment and admission to the school is not limited to

Union members. I therefore am refusing to issue a complaint in this matter.

Pursuant to the National Labor Relations Board Rules and Regulations, you may obtain a review of this action by filing an appeal with the General Counsel of the National Labor Relations Board, Washington, D.C. 20570 and a copy with me. This appeal must contain a complete statement setting forth the facts and reasons upon which it is based. The appeal must be received by the General Counsel in Washington, D.C. by the close of business on November 9, 1971. Upon good cause shown, however, the General Counsel may grant special permission for the longer period within which to file. A copy of any such request for extension of time should be submitted to me.

If you file an appeal, please complete the notice forms I have enclosed with this letter and send one copy of the form to each of the other parties. Their names and addresses are listed below. The notice forms should be mailed at the same time you file the appeal, but mailing the notice forms does not relieve you of the necessity of filing the appeal itself with the General Counsel and a copy of the appeal with the Regional Director within the time stated above.

Very truly yours,

SIDNEY DANIELSON,
Acting Regional Director.

Enclosure.
Registered Mail.
R.R.R.
cc: General Counsel
National Labor Relations Board
Washington, D.C. 20570
American Radio Association, AFL–CIO
270 Madison Avenue, New York, N.Y. 10016

Central Gulf Steamship Corporation, Attn: Mr. George Atkinson, Ass't. Tr.
One Whitehall Street, New York, N.Y. 10004
Edwin A. Steinberg, Esq.
90 Park Avenue, New York, N.Y. 10016
Lorenz, Finn, Giardino & Lambos, Attn: Jacob Silverman, Esq.
21 West Street, New York, N.Y. 10006

APPENDIX B

NATIONAL LABOR RELATIONS BOARD,
REGION 2, FEDERAL BUILDING,
New York, N.Y., October 26, 1971.

Re Central Gulf Steamship Corporation.
Case No. 2–CA–12445.

Mr. ARCHIE PELTZMAN,
8725 16th Avenue,
Brooklyn, N.Y.

DEAR SIR: Your charge in the above-entitled case alleging a violation under Section 8 of the National Labor Relations Act, as amended, has been carefully investigated and considered.

As a result of the investigation, it does not appear that further proceedings on the charge are warranted.

The investigation does not tend to establish that the above-named Company violated the National Labor Relations Act as alleged by you. The evidence establishes that the Company refused to re-hire you as a crew member aboard the S.S. Green Ridge pursuant to a valid Union security provision between it and the American Radio Association, AFL–CIO, because of your failure to remit initiation fees after notification by the latter that such fees were due and not for any reason prohibited by the aforesaid Act. I therefore am refusing to issue a complaint in this matter.

Pursuant to the National Labor Relations Board Rules and Regulations, you may obtain a review of this action by filing an appeal with the General Counsel of the National Labor Relations Board, Washington, D.C. 20570 and a copy with me. This appeal must

contain a complete statement setting forth the facts and reasons upon which it is based. The appeal must be received by the General Counsel in Washington, D.C., by the close of business on November 9, 1971. Upon good cause shown, however, the General Counsel may grant special permission for a longer period within which to file. A copy of any such request for extension of time should be submitted to me.

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Very truly yours,

SIDNEY DANIELSON,
Acting Regional Director.

Enclosure.
Registered Mail.
R.R.R.
cc: General Counsel
National Labor Relations Board
Washington, D.C. 20570
Central Gulf Steamship Corporation
Attn: Mr. George Atkinson, Ass't. Traffic Mgr.
One Whitehall Street, New York, N.Y. 10004
Lorenz, Finn, Giardino & Lambos
Attn: Jacob Silverman, Esq.
21 West Street, New York, N.Y. 10006

U.S. GOVERNMENT PRINTING OFFICE: 1972